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Nos. 84-28 and 84-143

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

vs.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

On Appeal from the United States Court of Appeals For the Ninth Circuit

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., AND THE FREEDOM TO READ FOUNDATION, AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES, AND MOTION FOR LEAVE TO FILE SUCH BRIEF

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Statement

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the National Association of College Stores, Inc., and The Freedom to Read Foundation (collectively referred to as the "*amici*") hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached brief *amici curiae* in this case. While the consent of the attorneys for appellees has been obtained, the consent of the attorneys for appellants was refused.

The *Amici*

The *amici*'s members publish, produce, distribute, sell and lend books, magazines and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is a trade association organized under the laws of the State of New York. It is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is a trade association organized under the laws of the State of New York. It is a major national association in the United States of publishers of general books, textbooks

and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is an Illinois not-for-profit corporation. It is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is a trade association organized under the laws of the State of New York. It is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Interest of the *Amici*

The *amici* are all involved in some aspect of making reading material of all kinds available to the general public. For this reason, the *amici* have a continuing interest in the decisions of this Court involving the balancing of First Amendment rights, and restrictions on materials with sexual content, including obscene materials not protected by the First Amendment. The *amici*'s brief will indicate the impact of the legal principles involved upon those who publish, produce, distribute, sell and lend material which is not obscene. The *amici* have brought the same perspective to the Court in previous cases. *E.g., Vance* v. *Universal Amusement Co.,* 445 U.S. 308 (1980); *Lo-Ji Sales, Inc.* v. *New York,* 442 U.S. 319 (1979). The *amici* have learned from experience that, in an eagerness to attack the social harms perceived to stem from the prevalence and accessibility of sexually-related materials, state and city legislators and enforcement agencies frequently treat legitimate constitutionally-protected books and periodicals identically with those materials which are obscene and not protected. Unless the constitutionally mandated distinction is main-

tained and ready access is provided to federal courts to enforce it, First Amendment rights may be threatened and curtailed.

In view of the foregoing, the *amici* seek leave to file the attached brief.

Dated: Jan. 2, 1985

Respectfully submitted,

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odcial Distributors Associations, the International Periodical Distributors Association, Inc., the National Association of College Stores, Inc., and The Freedom to Read Foundation (collectively referred to as the "*amici*") submit this joint brief, *amici curiae,* pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of the appellees in Nos. 84-28 and 84-143, having submitted a motion for permission to file same.

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tion is maintained and ready access is provided to federal courts to enforce it, First Amendment rights may be threatened and curtained.

ARGUMENT

Federal courts should be immediately available to determine the validity of legislation challenged as violative of First Amendment rights.

Appellants argue that state courts should be "given the opportunity to first construe a state obscenity statute and then leave to the federal court the review of any remaining constitutional claims if necessary." (Appellant Eikenberry's Juris. Statement, p. 14). In support of appellants, the Solicitor General as *amicus* argues that the *Pullman* abstention doctrine should be applied in cases such as those before this Court. (*Amicus* Br. p. 15).

These arguments misapprehend the proper role of the federal courts in protecting First Amendment interests and gloss over the harmful, practical effects such a policy would have on the ability of publishers, distributors, and retailers of First Amendment-protected materials to challenge vague, overbroad or otherwise unconstitutional state and local legislation.

The Role of the Federal Courts:

It is well established that it is the duty of a federal court to decide federal questions presented to it. *See Wisconsin* v. *Constantineau,* 400 U.S. 433, 439 (1971); *Zwickler* v. *Koota,* 389 U.S. 241, 248 (1967); *McNeese* v.

Board of Education, 373 U.S. 668, 672 (1963). In the Act of March 3, 1875, the predecessor of 28 U.S.C. § 1331, Congress first conferred federal question jurisdiction on the federal courts, making the federal courts the primary tribunals for enforcement of federal rights, a role previously reserved for the state courts.

In an important study of federal courts, Frankfurter and Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1928), the authors stated of the Act of March 3, 1875:

> Congress [in enacting the statute] gave federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.

Id. at 65. The Court quoted this statement with approval in *Zwickler* v. *Koota* and made it clear that once a plaintiff has chosen to seek vindication of rights arising under the Federal Constitution or federal laws in federal court, his choice of forum must be respected:

> Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims.

389 U.S. at 248.

The duty of the federal courts to decide federal questions is particularly strong in the area of First Amend-

ment rights. *See Zwickler* v. *Koota,* 389 U.S. 241, 252 (1967); *Baggett* v. *Bullitt,* 377 U.S. 360, 378-79 (1964). As stated by the court in *Garvin* v. *Rosenau,* 455 F.2d 233, 239 (6th Cir. 1972), in reversing a district court's invocation of the abstention doctrine in a First Amendment case:

> That the First Amendment is the essence of democratic government and that free speech is fundamental to our society need no elaboration. Historically, the guarantees of this amendment have been closely guarded by the federal courts.

See also Long Island Vietnam Moratorium Comm. v. *Cahn,* 437 F.2d 344, 347 (2d Cir. 1970); *Medrano* v. *Allee,* 347 F. Supp. 605, 620 (S.D. Tex. 1972). The reason for this attitude is that the violation of First Amendment rights is a matter of public concern which transcends the interests of even the individual litigants. Furthermore, it is a recognition that the consequences of federal abstention are delay and needless expense. Such consequences themselves can impermissibly chill the exercise of First Amendment rights.

Baggett v. *Bullitt,* 377 U.S. 360 (1964), concerned a loyalty oath requirement for state employees and teachers which was challenged for vagueness and overbreadth. The defendant urged the Court to abstain from hearing the plaintiff's First Amendment challenges to the statute. The Court decided to hear the issue, emphasizing that the very act of refusing to hear the case would have a chilling effect upon the exercise of First Amendment rights:

> We also cannot ignore that abstention operates to require piecemeal adjudication in many courts . . .

> thereby delaying ultimate adjudication on the merits for an undue length of time, . . . a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms. . . . Meanwhile, where the vagueness of the statute deters constitutionally protected conduct, 'the free dissemination of ideas may be the loser.'

Id. at 378-379 (citations omitted).

This principal was reaffirmed in *Zwickler* v. *Koota*, 389 U.S. 241 (1967), in which the Court held that a three-judge panel should have respected the plaintiff's choice of a federal forum for challenging the validity of a New York State statute which prohibited the distribution of anonymous handbills. The Court made clear that when substantial First Amendment questions are at issue, abstention is improper.

The principal argument made by appellants in this regard is that the state courts should have been given the opportunity to construe the reference to "lust" in the Washington statute. A very similar argument was rejected by the Court earlier this year in a case not involving the First Amendment. In *Hawaii Housing Authority* v. *Midkiff*, 104 S. Ct. 2321, 2327 (1984), the Court stated:

> In the abstract, of course, such possibilities [of limiting construction] always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, 'we have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature,

> and is obviously susceptible of a limiting construction.' *Zwickler* v. *Koota*, 389 U.S. 241, 251 . . . (1967).

That statement is particularly applicable to cases such as these, involving First Amendment challenges.

Even if there is such ambiguity, in First Amendment cases the ambiguity itself may render the statute void for vagueness. *See NAACP* v. *Button*, 371 U.S. 415 (1963).

In those relatively few cases when there truly is an ambiguity subject to a reasonable limiting construction, or when there is a substantial state issue that might avoid the necessity of deciding the First Amendment question, the *Pullman* doctrine may be applied, but only if the federal court, retaining jurisdiction under *England* v. *Louisiana State Board*, 375 U.S. 411 (1964), enjoins enforcement of the ambiguous or apparently unconstitutional provisions pending the state court's decision. Only then will the First Amendment rights of those dealing in protected materials be safeguarded in the interim.

The Solicitor General in his *amicus* brief suggests that abstention was appropriate here because "the statute under attack is designed to employ the State's historical and powerful interests in 'the quality of life and the total community environment, the tone of commerce in the great city centers and, possibly the public safety itself' " (page 18), without even referring to the substantial federal interests in the upholding of First Amendment rights. Such state interests are, however, the basis of virtually every state statute which has been found to run afoul of the First Amendment with respect to sexually-related speech. The Solicitor General's position totally disregards the

preeminence of the First Amendment and the paramount obligation of the federal courts to protect and foster First Amendment values.

Further, whether or not to abstain is not a theoretical or abstract question; a decision to abstain has significant and dangerous practical ramifications.

Practical Effects:

The argument of appellants and the Solicitor General that appellees and persons like them be required to seek vindication of their First Amendment rights from state courts in the first instance has practical ramifications adverse to the exercise of First Amendment rights that demonstrate the fallacy of the argument. When state or local criminal laws which appear to encroach upon First Amendments rights are passed, law-abiding publishers, wholesalers, booksellers and other retailers such as the *amici* find themselves in an untenable position. They may await affirmative action by the state offering an opportunity to challenge or limit the offending legislation. However, such action may be far off, and, if, as is often the case, the prosecution is brought against a seller of *Miller*-type obscenity whose actions are clearly within the permissible scope of regulation, the defendant may be barred from asserting the legislation's unconstitutionality as to non-obscene material offered by the *amici*. (Certainly that is not the most sympathetic context for the constitutional arguments of a seller of non-obscene material to be raised).

Until the state courts resolve the constitutional issues, local pressure based on the offending legislation is exerted against the *amici* by police, prosecutors, mayors, etc., to

cease publishing, distributing, or selling materials believed by the *amici* to be constitutionally-protected, but believed by the state to be within the purview of the offending legislation. In the interim, publishers, distributors and retailers are ultra-cautious in the exercise of their First Amendment rights, for to be labelled a "pornographer" in a criminal prosecution has business and social ramifications that can never be overcome, even if First Amendment rights are ultimately vindicated. Retailers self-censor and cease stocking challenged materials. In some cases, such as supermarkets and other locations where printed materials are not the primary products, the safest response may be to cease stocking all books and periodicals.

Nor is it an answer to say that the *amici* can protect their rights by seeking a declaratory judgment in the state courts. The *amici* were among the plaintiffs in a recent case brought in the United States District Court for the Southern District of Indiana challenging the constitutionality of an Indianapolis, Indiana, feminist "civil rights" ordinance attempting to ban sexually-related materials conceded not to fall within the *Miller* guidelines. *American Booksellers Association* v. *Hudnut,* Cause No. IP 84-791C, (S.D. Ind., November 19, 1984) (Barker, J.). The District Court declared the ordinance blatantly unconstitutional on a number of grounds.

The consideration and passage of the Indianapolis ordinance had been accompanied by great emotion, politicking, etc. Rape victims and battered women testified in favor of the ordinance. "Church-going conservatives . . . turned out by the busload when the council considered the

issue." *Washington Post,* July 29, 1984, at A4. Contemporaneously, in Minneapolis, where a similar ordinance was under consideration, one woman attempted to immolate herself and 25 others were arrested after "a chanting, stomping demonstration" in the City Council building. *New York Times,* July 14, 1984, § 1, at 46. *See also New York Times,* July 12, 1984, § A, at 12.

Had the Indiana federal court not been available to plaintiffs, the case would necessarily have been brought in a state trial court. All of the state court judges before whom the case might have been heard were to stand for reelection in November 1984, and would have been under substantial political pressure with respect to the determination of that case. This cannot be the forum to which the vindication of First Amendment rights should be entrusted.

State courts, because they are often more susceptible to community pressures and because they are not as likely to be sensitive to federal constitutional issues raised by the First Amendment, may not be as ready as the federal courts to grant timely relief. Even a momentary chilling of First Amendment rights is prohibited by the First Amendment. *Elrod* v. *Burns,* 427 U.S. 347, 373 (1976).

Further, appellants' suggestion does not, as they imply, merely give the state courts an initial opportunity to decide the issue, subject to subsequent correction by the federal courts. Submission of these issues to a state court and determination by that court may bar federal examinations of the issues on the principles of res judicata or

collateral estoppel. Thus, for all practical purposes,* the federal courts, whose primary role is and should be the protection of federal rights, would be ousted from the opportunity to determine the scope of such rights. *See Allen* v. *McCurry,* 449 U.S. 90 (1980); *Kremer* v. *Chemical Construction Corp.,* 456 U.S. 461 (1982); *Haring* v. *Prosise,* 462 U.S. 306 (1983). Even if plaintiff desired to reserve its federal claims while litigating state issues, a posture that in most cases would not make sense and would only delay vindication of First Amendment rights, subsequent litigation in the federal courts of the unraised federal issues would also be barred. *See Migra* v. *Warren City School District Board of Education,* 104 S. Ct. 892 (1984).

CONCLUSION

For the reasons set forth above, we respectfully urge this Court not to extend the *Pullman* abstention doctrine in the area of First Amendment challenges such as those in the cases before the Court. We further urge that, in those few cases in which abstention may be appropriate (either because there is truly an ambiguity subject to a reasonable limiting construction or because there is a substantial state issue that might avoid the necessity of deciding the First Amendment question), the federal district court be required to follow the rule in *England,* retain jurisdiction and enjoin enforcement of the ambiguous or apparent unconstitutional provisions pending resolution of

* While this Court could ultimately review the determination on petition for certiorari, in light of the Court's caseload and ability only to grant certiorari in a minute percentage of the cases in which it is sought, that is a slim reed on which to rest First Amendment rights.

the state law issues. Only then will First Amendment rights appropriately be protected.

Respectfully submitted,

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